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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 1255

BANK OF NEW YORK,

Petitioner,

against

LOUISE A. GRIFFITH,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

GEORGE W. MARTIN,
Counsel for Petitioner.

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PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice of the United States and Associate Justices of the Supreme Court of the United States:

Your petitioner, Bank of New York, prays that a writ of certiorari issue to review the decision of the United States Circuit Court of Appeals for the Second Circuit, in this case, reversing the decision of the United States District Court for the Southern District of New York.

Jurisdiction

The order for mandate was entered March 19, 1945. Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

Summary Statement of Matter

In 1938, your petitioner, Bank of New York, was trustee under the will of Anna R. Morison (62-63), for the benefit of Ada Kaufman for life, remainder to her two children—of whom the respondent, Louise A. Griffith is one. In that year Ada Kaufman died (27), and the trust term ended.

Bank of New York promptly brought an action in the New York Supreme Court to have the will construed, and to account as trustee (44). This action resulted in an interlocutory decree dated July 1, 1940, and a final judgment dated August 27, 1941 (4-15). The final judgment, which settled the accounts of the trustee and discharged it (20), was made on consent of the respondent (16); and no appeal therefrom has ever been taken, and no motion with regard to it has ever been made. It is admitted that this judgment constitutes a discharge of all liability on the part of the trustee (20). Under this judgment her entire remainder interest in the trust property was delivered by the trustee to the respondent (21).

In 1943 a collateral attack on this judgment was made by the respondent. She sued out a citation in the Surrogates' Court in New York County and served it

on your petitioner, praying (26-60) that your petitioner be compelled to account as trustee for the trust property which your petitioner had turned over to her pursuant to the judgment of the Supreme Court in 1941. And she alleged that she had been subjected to duress when she executed the consent to the entry of that judgment (59-60) in that the trustee refused to surrender the trust property to her without a judgment (whether by consent or after a trial).

The Surrogates' Court held a hearing, and dismissed the respondent's petition and vacated the citation (75-76); and the Surrogate wrote a memorandum of decision reported in New York Law Journal October 26, 1943, at pages 1087-1088, which is printed in full *infra*. And he said:

> "If fraud or newly discovered evidence or other grounds for the vacatur of that judgment is claimed, the attack upon it must be made by a direct application to the Supreme Court."

Thus the issue of duress was judicially decided, and the law of New York was stated. From this adjudication by the Surrogates' Court no appeal was taken, and no motion with regard to it has ever been made.

In 1944 another collateral attack on the judgment of the Supreme Court was made by this respondent. She commenced this action in the United States District Court for the Southern District of New York, and alleged damages on account of duress exerted upon her by your petitioner in that the trustee refused to surrender the trust property to her without a judgment (whether by consent or after a trial); and she pleaded

the judgment was a good bar to liability (21), and had been so held by decree of the Surrogates' Court (22), and because it was a bar to liability, she had sustained damage.

The District Court held a hearing, and dismissed the respondent's complaint (84-85) and wrote two memoranda (77-79; 83). And he said:

> "The plaintiff in this action first brought a proceeding in the Surrogates' Court, New York County, in which she petitioned for the filing of a compulsory account. That proceeding was dismissed upon the ground that the judgment in the Supreme Court was conclusive and could not be collaterally attacked" (78-79).

This respondent then appealed to the Circuit Court of Appeals, which Court reversed the District Court and remanded the case.

Questions Presented

(1.) In a Federal Court must the judgment of a State Court be accorded the same effect as *res judicata* that would be given to it by the courts of the state in which it was rendered?

(2.) Having litigated the issue of extrinsic fraud and duress in a competent State Court and been defeated, can the plaintiff then litigate the same question in a Federal Court, acting independently?

(3.) Is the rule as to *res judicata* equally as true of questions of law in their relation to the controversy before the Court as to questions of fact?

(4.) Is there a jurisdiction in Federal Courts to review and revise the acts and decisions of courts of coordinate jurisdiction upon questions which they have lawfully considered and adjudged?

Reasons Relied Upon

The respondent resorted to the Surrogates' Court and there made a collateral attack on the Supreme Court judgment which had settled the trustee's accounts. She pleaded extrinsic fraud and duress (59-60). She alleged the "trustee refused to turn over the trust estate except on release and discharge", and so she had been forced to consent to the judgment.

The Surrogates' Court held this was no allegation of facts sufficient to support a collateral attack (*Vid. Infra*, this brief, p. 14). This is undoubtedly the law of New York. The District Court concurred.

But the Circuit Court of Appeals reversed the District Court, overruled the Surrogates' Court, decided that the facts alleged as to duress were indeed sufficient to constitute a cause of action, and thus constituted itself an appellate tribunal for the purpose of reversing coordinate courts of the State on questions of local law.

This is a departure from the accepted and usual course of judicial proceedings, and is without precedent.

Freeman on Judgments (5th Ed.) § 1465.

WHEREFORE, your petitioner prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the Second Circuit, to the end that this case may be reviewed by this Court.

BANK OF NEW YORK,

By: GEORGE W. MARTIN,
Its Counsel.

May 15, 1945.

BRIEF IN SUPPORT OF PETITION

Opinions Below.

The opinions of the District Court (per Caffey, *J.*,) appear in the Record at pages 77 and 83 and have not been printed in the reports. The opinion of the Circuit Court of Appeals (per Clark, *J.*,) appears at page 89 of the Record, and is reported in 147 F. (2d) 899.

Statement of the Case

The basis of jurisdiction to review, the facts, the rulings below, and the questions presented are set forth in the foregoing petition.

Specification of Errors

The Circuit Court of Appeals erred:

In holding that the facts alleged in the complaint constituted the statement of a cause of action when the State Court had already adjudged otherwise.

In deciding, in conflict with applicable local decisions, that, as a matter of substantive law, a trustee may not, under pain of duress, insist on a release or a judicial decree settling the trust accounts as a condition of turning over the trust property.

In departing from the accepted and usual course of judicial proceedings by overruling and reversing the decision of a State Court having prior jurisdiction.

Summary of Argument

Bank of New York was a trustee. Mrs. Griffith was a remainderman. The trust ended, and the trustee's accounts were settled by a judgment of the New York Supreme Court (4-15). To that action Mrs. Griffith was a party (4). That judgment is still in full force and effect.

Then Mrs. Griffith sued in the New York Surrogates' Court to compel an accounting by the trustee (26-60). That Court held the judgment of the Supreme Court was *res judicata* on the question of the accounts (76). Mrs. Griffith said the judgment had been recovered by duress (59-60). The Court said the facts alleged did not constitute duress under New York law. The Court accordingly dismissed Mrs. Griffith's suit by decree (76). That decree is still in full force and effect.

Then Mrs. Griffith sued in the District Court, in tort (19-23), and alleged duress (22) on precisely the same facts as pleaded in the Surrogates' Court. The District Court dismissed the complaint (84-85). Mrs. Griffith appealed (86). The Circuit Court of Appeals reversed (104), holding duress had been adequately pleaded (92).

It is quite clear that "where a state decision or judgment has determined and applied the law governing the rights of the parties upon the particular controversy before it, the judgment is *res judicata* as to both the law and the facts in a subsequent action between them in a federal court involving the same matter, whether the law applied is statutory or general in its nature

and even though, as a mere precedent, it might or might not be followed in a case involving different parties". (*Freeman on Judgments* (5th Ed.), § 1467.)

POINT I

The Decision of the Surrogates' Court is *res judicata* as to the effect of the Judgment of the Supreme Court.

The Surrogate said (*infra*, p. 14):

> "Pursuant to this judgment distribution was made, and the reserve fund ultimately distributed to the parties entitled to it upon their giving the requisite receipts. The petitioners in this proceeding, in effect, attempt to open the issues and the final judgment entered in the action. * * * The motion to dismiss the compulsory proceeding is granted on the ground that such judgment is conclusive and may not be collaterally attacked (*Crouse* v. *McVickar*, 207 N. Y. 213)."

The Circuit Court of Appeals did not agree with the Surrogate (93). They decided that it was not the law of New York that in the circumstances of this matter the judgment could not be collaterally attacked, notwithstanding the Surrogate's prior adjudication of the matter. And so they directed a relitigation of the issues thus previously disposed of by the Surrogate.

Freeman on Judgments (5th Ed.), § 1466:

> "The effect which a state judgment shall have as *res judicata* in the federal courts is a matter of state or local law of the state where the judgment was rendered."
>
> *Union & Planters' Bank* v. *Memphis*, 189 U. S. 71, 75.

It makes no difference whether the Surrogate was right or wrong. The judgment of that Court is *res judicata*, and cannot be reversed in the federal courts.

Boundary County v. *Woldson*, 144 F. (2) 17, 19;
National Lead Co. v. *Nulsen*, 131 F. (2) 51, 56;
Restatement, Judgments, §48.

POINT II

The Decision of the Surrogates' Court is *res judicata* as to the sufficiency of the Statement of a Cause of Action for Duress.

The Surrogate said (*infra*, p. 14):

> "Your petitioners were advised by said trustee and its attorneys and by their own attorneys that unless your petitioners should agree to release said trustee and waive all objections to their accounts and accept the property in kind, said estate would be further wasted by a reference the cost of which would have to be borne by the trust funds coming to your petitioners. * * * Your petitioners * * * were forced to release said trustee and to consent to the allowance of the trustee's accounts in the Supreme Court in order to obtain property to which your petitioners were entitled. Said trustee refused to turn over said estate except on release and discharge and the acceptance of its accounts, and your petitioners were unable to contest such demands due to the danger and the direct threat of the continuance of disastrous and wasteful litigation."

The Surrogate held this was not a statement of facts sufficient to constitute a cause of action apart from a

collateral attack on the judgment of the Supreme Court, and dismissed the petition (76).

There is no question but that the Surrogate correctly applied the law of New York. A trustee does not have to surrender the trust property unless and until his accounting is either approved by the remainderman or passed upon by a court.

> *Neary* v. *City Bank Farmers' Trust Co.*, 260 App. Div. 791, 793.

Right or wrong, however, that should have been the end of that issue, except on an appeal. This is not a question of procedure. The issue was raised, the proceeding was based on it, and it was adjudicated.

The Circuit Court of Appeals, however, on presentation of the issue, applied the law of Oklahoma (*Ingram* v. *Lewis*, 37 F. (2) 259), and concluded that the Surrogates' Court "seems to be going beyond the ancient distinction between forms of fraud" (95); and they decided that the adjudication of the issue could not have been on the merits—apparently because the Surrogate "does not speak of 'intrinsic fraud' in terms"; and then they reversed the Surrogates' Court, and decided that the complaint did state a cause of action (citing *Ingram, supra*); and they reversed the District Court and remanded the case, because the law of New York did not afford "an adequate remedy, since motions to set aside a judgment for fraud are not contemplated by the relevant sections of the New York Civil Practice Act" (96).

It is quite true that the law of New York affords no remedy such as the Circuit Court of Appeals has directed. The decision of the Court is in conflict with applicable local decisions. But the overruling of the decision of a State Court on the very issue between the same parties, on the authority of foreign law, is quite out of the ordinary. For the judgment of a State Court which has jurisdiction should not be ignored or collaterally impeached in a Federal Court, nor should it be modified for mere error.

Freeman on Judgments (5th Ed.), § 1464.
Restatement, Judgments, § 50.

LAST POINT

Pray the Court will Review this Matter.

Hundreds of trusts in New York end each year, and are wound up by the trustee taking a receipt and release from remaindermen or entering a judgment by consent. These settlements are favored by the State Courts.

Matter of White, 182 Misc. 223, 227.

It is customary and lawful for the trustee to retain possession of the trust property until the formal or judicial settlement is effected. In New York this practice as a matter of law does not constitute duress.

Kamenitsky v. *Corcoran*, 177 App. Div. 605, 608;
Crossways Apartments Corp. v. *Amante*, 213 App. Div. 430, 436.

If, after the entry of a consent decree settling a trustee's accounts, a remainderman can come into the District Court and say: "Duress! Because the trustee refused to surrender the trust property until I had consented to the accounting decree"; and thereupon the District Court is to ignore the decree and try out the issues anew applying, not the law of New York, but a rule laid down in Oklahoma for the protection of a Creek Indian fallen among thieves (*Ingram* v. *Lewis*, *supra*): then there will be a great confusion among courts, and conflicts of jurisdiction, and uncertainty as to the finality of judgments; and no man can tell the end of it.

Respectfully submitted,

GEORGE W. MARTIN,
Counsel for Petitioner.

May 15, 1945.

Appendix

ESTATE OF ANNA R. MORISON

N. Y. Law Journal, October 26, 1943, Pages 1087-1088.

FOLEY, SURROGATE:

The petitioners seek the filing of a compulsory account by the testamentary trustee. After the return of citation, the latter moved to dismiss the proceeding on the pleadings. The general grounds raised by the trustee as a basis for the relief sought are that an action was begun in the Supreme Court, New York County, by the trustee, and all of the persons interested in the trust, including the petitioners, were made parties. The trust under the will had terminated. A construction of the will as to the vesting of the remainders was asked, together with the judicial settlement of the trustee's account. The question of interpretation was determined by an interlocutory judgment which was affirmed on appeal by the Appellate Division (*Bank of N. Y. as trustee of Morison*, &c., v. *Kaufman*, 26 N. Y. S., 2d. 474, aff'd. 261 App. Div. 818; leave to appeal denied 285 N. Y. 855). An account and supplemental account were filed.

Final judgment in the action was rendered on August 27, 1941, in which the accounts were judicially settled, and directions made for distribution of certain of the assets to each of the petitioners; and the plaintiff trustee was released and discharged from "all further liability, responsibility or accountability with respect to all matters embraced in this accounting". A small amount was held in reserve for contingent liability for taxes.

Pursuant to this judgment distribution was made, and the reserve fund ultimately distributed to the parties entitled to it upon their giving the requisite receipts. The petitioners in this proceeding, in effect, attempt to

open the issues and the final judgment entered in the action. During the greater period of the pendency of the action the petitioners had been represented by a firm of attorneys who withdrew shortly before the entry of final judgment. New counsel appears to have subsequently represented the petitioners; but they signed and acknowledged a formal consent to the entry of the final judgment. The motion to dismiss the compulsory proceeding is granted upon the ground that such judgment is conclusive and may not be collaterally attacked (*Crouse* v. *McVickar*, 207 N. Y. 213).

There is not the slightest basis in law for the contention of the petitioners that the Surrogate's Court has exclusive jurisdiction over the account of the trustee. Concurrent jurisdiction is vested in the Supreme Court (*Matter of Runk*, 200 N. Y., 447; *Colson* v. *Pelgram*, 259 N. Y. 370; *Matter of Malloy*, 278 N. Y. 429). It was within the discretion of the petitioners to have applied to the Supreme Court to have the matter transferred to the Surrogate's Court as a matter of comity (*Matter of Runk, supra; Bloomingdale* v. *Bloomingdale*, 258 App. Div. 231). They failed to do so. It is the general rule that where separate actions or proceedings have been instituted between parties in reference to the same matter in courts having concurrent jurisdiction, "the court which first obtains jurisdiction with adequate power to administer full justice should continue to exercise it". (*Coulson* v. *Pelgram*, *supra*, at p. 275.) In the estate here involved, by continuing as parties to the action, the petitioners are concluded by the judgment. If fraud or newly discovered evidence or other grounds for the vacatur of that judgment is claimed, the attack upon it must be made by a direct application to the Supreme Court (*Crouse* v. *McVickar, supra*).

Submit order on notice dismissing the compulsory proceeding accordingly.

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CHARLES ELMORE CR

IN THE

Supreme Court of the United States

October Term, 1944.

No. 1255....

BANK OF NEW YORK,

Petitioner,

AGAINST

LOUISE A. GRIFFITH,

Respondent.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

JOSEPHINE E. KESTLER,
Attorney for Respondent.

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LOUISE A. GRIFFITH,
Respondent.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

The exhaustive opinion of the Circuit Court of Appeals (per Clark, *J.*, writing for a unanimous Court), analyzing and discussing every contention that could have possibly been urged in this litigation appears at page 89 of the Record, and is reported in 147 F. 2nd 899.

The Real Question Presented.

The real question here presented—and a question which needs no second review by this Court (*Ingram* v. *Lewis*, 37 Fed. 2nd 259, cert. denied 282 U. S. 842)—is by no means any of the meaningless abstractions which the petitioner presents on page 4 of its petition.

The only issue here really involved is whether a consent judgment obtained from a beneficiary in a state court by a trustee may be attacked in the Federal Court, where

such consent judgment was wrung from the beneficiary by the trustee's

> "duress" consisting of the trustee's "willful withholding of principal and income of the (trust) estate, initiation of unnecessary and expensive litigations exhausting" this respondent-beneficiary, " * * * and threatened unfair and oppressive expense of litigation and withholding of the (trust) estate, coupled with refusal of information as to the trustee's conduct of the trust."

Such are the allegations of the complaint which must here be taken as facts, as the complaint is here on demurrer (*Locke* v. *Pembroke*, 280 N. Y. 430),—and such is the Circuit Court's own summarization of the breaches of trust of which the petitioning trustee, for the purposes of this proceeding, stands convicted. (See opinion below, p. 90).

May such a trustee, despite the cover of a state court consent judgment which it has extorted from its beneficiary be brought to book in the Federal Court—or may it not?

That is the single issue here presented—and not the question-begging creations which the petitioner poses as "questions" on page 4 of its petition.

POINT I.

The falsity of the "questions" presented by the petitioner.

The one real question in this case is as follows:

> May a trustee who, in a state court, has obtained by duress and fraud a consent judgment of absolution from his beneficiary be sued in the Federal

Court for the damage his fraud and duress have caused?

And this is a question which has already previously been squarely considered by this Court, and found unnecessary of review (*Ingram* v. *Lewis*, 37 Fed. 2nd, 259, cert. denied 282 U. S. 842).

Nor should this question be befogged by the fact that the victimized beneficiary here before appealing to the Federal Court, first vainly appealed to another state court of New York—the Surrogate's Court—to right the wrong which had been perpetrated by the New York Supreme Court decree of August 27, 1941 which had been extorted by the petitioning trustee here from its beneficiary.

For nothing was adjudicated by the learned Surrogate's Court—notwithstanding the respondent-beneficiary's "erroneous legal conclusion" to the contrary in its own complaint below, which as an "erroneous legal conclusion" is of course "denied the dignity of an estoppel." (*Brick* v. *Cohn-Hall-Marx Co.*, 283 N. Y. 99, 105.)

And the Circuit Court's opinion below makes clear that all that "can be sure * * * is that the Surrogate dismissed the (respondent-beneficiary's) petition for reasons not going to the merits" so that "it is not *res judicata* on points which might have been included, but were not adjudicated" (opinion below, page 95 and see cases there cited).

Thus, the fact that the respondent-beneficiary sought relief in the Surrogate's Court and was denied it "for reasons not going to the merits", is no bar to the relief which the beneficiary now here seeks.

It is this fact—"that the Surrogate dismissed the (beneficiary's) petition for reasons not going to the merits"—that disposes of the question (2) which the petitioner presents on page 4 of its petition—in which the petitioner asks whether "the plaintiff here may litigate the same question in the Federal Court" after "having litigated

the issue of extrinsic fraud and duress" in the Surrogate's Court.

The joker in this second question thus propounded by the petitioner on page 4 of its petition is that "the issue of extrinsic fraud and duress" was never tried in the Surrogate's Court.

Such is the kind of joker hidden in every one of the four "questions" posed by the petitioner on page 4 of its petition. The exposure of the falsity of these "questions" will expose also the groundlessness of the entire petition here presented.

A.—Why Petitioner's First "Question" Means Nothing in This Case at Bar.

The first "question" presented by the petitioner on page 4 of its petition is as follows:

> (1) "In a Federal Court must the judgment of a State Court be accorded the same effect as *res judicata* that would be given to it by the courts of the state in which it was rendered?"

There can be but one possible answer to this question thus posed by the petitioner—and that is, that of course the judgment of a state court must "be accorded the same effect as *res judicata*" by the Federal Court as "would be given to it by the courts of the state in which it was rendered."

But what has all of this to do with the real issue here in question?

For a New York state court will accord no more "effect as *res judicata*" to a judgment obtained by extrinsic fraud than will the Federal Court (*Crouse* v. *McVickar*, 207 N. Y. 213).

The Circuit Court's opinion below, as well as the New York authorities, all agree that, just as stated by the Circuit Court below (94):

"The *Crouse* case, therefore, actually reiterates and re-enforces the general rule, well settled in New York, that judgments obtained by extrinsic fraud can be attacked collaterally, *Lapiedra* v. *American Surety Co.*, 247 N. Y. 25, 31, 125 N. E. 710; *Hoes* v. *New York, N. H. & H. R. Co.*, 173 N. Y. 435, 66 N. E. 119; *Ferguson* v. *Crawford*, 70 N. Y. 253, 267; *Manderville* v. *Reynolds*, 68 N. Y. 528, 543. * * * It seems fairly clear, therefore, that New York does allow collateral attack on a judgment for extrinsic fraud or duress, as we concluded after an extensive analysis of the cases dealing with foreign divorce decrees. *Cohen* v. *Randall*, 2 Cir., 137 F. 2d 441, 443, 445, certiorari denied 320 U. S. 796."

Since there is thus no doubt whatsoever, "that New York does allow collateral attack on a judgment for extrinsic fraud or duress", what meaning is there in the petitioner's asking whether "a Federal Court" must give "the same effect as *res judicata*" to a state court judgment as would the state court—when both Federal Court and New York state courts will impeach collaterally a judgment obtained by extrinsic fraud?

The answer is—none.

For the real question is not whether a Federal Court should give any less weight to a state court judgment than would the state court—but whether any court, state or Federal, will give any weight to a judgment obtained by extrinsic fraud (*Crouse* v. *McVickar*, 207 N. Y. 213; *Lapiedra* v. *American Surety Co.*, 247 N. Y. 25; *United States* v. *Throckmorton*, 98 U. S. 61; *Ingram* v. *Lewis*, 37 Fed. 2nd 259, cert. denied 282 U. S. 842.

It thus becomes clear why this first "question" presented by the petitioner on page 4 of its petition is wholly meaningless.

For there can be but one possible answer to this first "question" as propounded by the petitioner—and that an

answer which gives no help in the solution of anything in this litigation here.

B.—Why the Petitioner's Second "Question" Also Is Meaningless in This Case at Bar.

This brings us to the equally meaningless question which is petitioner's (2) on page 4 of its petition, in which it asks:

> (2) "Having litigated the issue of extrinsic fraud and duress in a competent State Court and been defeated, can the plaintiff then litigate the same question in a Federal Court, acting independently?"

But the joker in this "question" as already indicated on pages 3 and 4, *supra*, and as made perfectly clear in the Circuit Court's opinion below (p. 95) is that "the issue of extrinsic fraud and duress" was never "litigated" in any "state court", " * * * competent" as the petitioner puts it—or otherwise.

What shall be said, then, of this second "question" propounded by the petitioner on page 4 of its petition, in which the petitioner asks whether "the issue of extrinsic fraud and duress" can be litigated again, having once been litigated before, when it is realized as the Circuit Court below was at pains to make clear, that "the issue of extrinsic fraud and duress" was never litigated, *even once!* (pp. 95-96, opinion below).

Such is the stripe of each of the "questions" posed by the petitioner.

C.—Why the Petitioner's Third Question Is as Meaningless as Its First Two.

The third "question" which the petitioner poses on page 4 of its petition is as follows:

(3) "Is the rule as to *res judicata* equally as true of questions of law in their relation to the controversy before the Court as to questions of fact?"

This is another question which just like the first "question" posed by the petitioner allows for only one answer—namely, that of course, "the rule as to *res judicata* (is) equally true of questions of law" as it is "to questions of fact" (*sic*).

But having thus answered the petitioner's question as presumably it would like to have it answered, where then does such answer leave us in the concrete situation at bar?

For the learned Surrogate's Court of New York having "dismissed the (beneficiary's) petition for reasons not going to the merits" (Circuit Court's opinion, p. 95), it is perfectly clear that such dismissal "is not *res judicata* on points which might have been included, but were not adjudicated" (Circuit Court's opinion, p. 95 and see cases there cited).

Where then is the *res judicata* here at all?

And since there is no *res judicata* here at all, of what avail is it to the petitioner to pose the abstraction whether "the rule as to *res judicata*" is as true with regard to "questions of law" as it is with regard to "questions of fact?"

What has any such empty riddle at all to do with the real questions that were so fully discussed by the Court below?

D.—Why the Petitioner's Fourth "Question" Is as Meaningless at Bar as Are Its First Three Questions.

The final "question" propounded by the petitioner (top of page 5 of its petition) is as empty an abstraction divorced from anything real in the case at bar as are the first questions posed by the petitioner.

In "question" (4) the petitioner solemnly asks:

> "Is there a jurisdiction in Federal Courts to review and revise the acts and decisions of courts of coordinate jurisdiction upon questions which they have lawfully considered and adjudged?"

What possible answer can there be to this question but that, of course, no Federal Court will "review and revise the acts and decisions of courts of coordinate jurisdiction upon questions which they have lawfully considered and adjudged."

But where in this case at bar is there any court which has "lawfully considered and adjudged" whether the judgment wrung by the petitioning trustee from the beneficiary at bar on August 27, 1941 was obtained by extrinsic fraud or not?

Not the Surrogate's Court—as made fully clear in the Circuit Court's opinion below (p. 95).

For the Surrogate "dismissed the petition for reasons not going to the merits" (p. 95), so that nothing was "adjudged" by that court on the issue of extrinsic fraud and duress.

And, of course, the Supreme Court of New York which was used by the petitioner "as a well considered step * * * in the scheme leading to the fraud" which it perpetrated upon its beneficiary (p. 93), has never "lawfully considered and adjudged" the question as to whether its own judgment was procured by extrinsic fraud and duress or not.

Thus, though there is no court that has as yet "lawfully considered and adjudged" the question as to whether the Supreme Court judgment of August 27, 1941 was obtained by extrinsic fraud and duress or not, petitioner completes its list of "questions" with a final empty abstraction in which it asks meaninglessly whether there is "jurisdiction in Federal Courts to review * * * the acts * * *

of courts of coordinate jurisdiction upon questions which they have lawfully considered and adjudged!"

Thus, utterly groundless, and of no meaning, are the "questions" which the petitioner asserts are here involved —and equally groundless and meaningless are the allegations of "errors" which petitioner, on page 7 of its petition, asserts were made by the Court below.

POINT II.

The petitioner's own statement of the alleged "errors" of the Circuit Court below reveals that the Court below erred not at all.

The petitioner asserts that the Circuit Court below erred in "holding that the facts alleged in the complaint constituted the statement of a cause of action when the State Court had already adjudged otherwise."

But, of course, as already made clear, a main point of the Circuit Court's opinion below was that *NO* "State Court had already adjudged otherwise"—which is precisely why the Court below felt free to assume jurisdiction of the case (p. 95 of opinion below).

Yet the petitioner persists in blinding its eyes to this main point which bulks so large in the Circuit Court's opinion below—that the Federal Court could here assume jurisdiction precisely because no "state court had already adjudged" the question of extrinsic fraud in issue here (p. 95, opinion below).

The third specification of errors which the petitioner sets forth on page 7 of its petition, in which it alleges that the Circuit Court of Appeals erred "in departing from the accepted and usual course of judicial proceedings by overruling and reversing the decision of a State Court having prior jurisdiction" is simply a repetition in different words

of the first specification of errors which the petitioner alleges—and is equally meaningless. For no "State Court", whether it be Supreme Court or Surrogate's Court, ever made any decision on the one question here involved—as to whether the Supreme Court decree of August 27, 1941 was obtained by extrinsic fraud and duress or not.

Nor is it "true" as petitioner says on page 12 of its petition, "that the law of New York affords no remedy such as the Circuit Court of Appeals has directed." (To the emphatic contrary see *Crouse* v. *McVickar*, 207 N. Y. 213, *Lapiedra* v. *American Surety Co.*, 247 N. Y. 25, and the other cases cited in the Circuit Court opinion below at p. 94.)

All that is true is that in the *same* action in which the consent judgment was extorted from the beneficiary, it would be impossible to obtain "an adequate remedy" (*Gysin* v. *Gysin*, 263 N. Y. 509, and other cases cited in Circuit Court's opinion, p. 96).

This is not to say, however, that in a "new" suit in the New York State court, the plaintiff beneficiary would be denied relief (*Crouse* v. *McVickar*, 207 N. Y. 213, *U. S.* v. *Throckmorton*, 98 U. S. 61, 65).

The choice as to which forum to elect is, of course, the plaintiff's. She is not to be turned away from the Federal Court, to which she appeals on the ground of diversity of citizenship, because the action that she brings here in a "new" suit is one that she could also have brought in the state court also, in a "new" suit (*United States* v. *Throckmorton*, 98 U. S. 61, 65).

Thus the remedy that would be the plaintiff beneficiary's in the New York State Court is the same remedy that she is now seeking here in the Federal Court—that is, the impeachment of a New York State court judgment obtained by extrinsic fraud (*Crouse* v. *McVickar*, 207 N. Y. 213, *Ingram* v. *Lewis*, 37 Fed. 2d 259, cert. denied 282 U. S. 842).

This brings us, in conclusion, to the typical joker contained in the second "specification of errors" where the petitioner claims that the Circuit Court of Appeals erred in

> "deciding, in conflict with applicable local decisions, that, as a matter of substantive law, a trustee may not, under pain of duress, insist on a release or judicial decree, settling the trust accounts as a condition of turning over the trust property."

But where is the "substantive law" of New York State which holds that a trustee may use trust property as a weapon in intimidating a beneficiary into agreeing to "a release or judicial decree" without being subsequently called to account for it?

Indeed, the "substantive law" of New York State is quite the contrary, and, of course, wholly in agreement with the Federal Court rule, and the general rule as expressed in *Ingram* v. *Lewis*, 37 Fed. 2nd 259, cert. denied 282 U. S. 842—"that judgments obtained by extrinsic fraud can be attacked collaterally" (see the numerous cases cited in the Circuit Court's opinion below, pp. 93 and 94).

Thus squarely controlling in the matter, in perfect accord with the New York rule which is also the general rule, as expressed in the cases cited on pages 93 and 94 of the opinion below, see the case of *Ingram* v. *Lewis*, 37 Fed. 2nd, 259, cert. denied 282 U. S. 842, which the petitioner waves away on page 13 of its petition as the case "of a Creek Indian fallen among thieves."

The petitioner would seem to intimate, reading page 13 of its petition, that somehow or other "a rule laid down in Oklahoma for the protection of a Creek Indian fallen among thieves" (*Ingram* v. *Lewis*, *supra*), is not the same, and should not be the same, as the rule laid down in New York for the protection of a trust fund lamb fallen among the money changers of Wall Street.

If that is so, then, indeed, there may be something for this Court to review.

But, in truth, there is nothing for this Court to review (*Ingram* v. *Lewis*, 37 Fed. 2nd 259, cert. denied 282 U. S. 842.

For the law in Oklahoma on the point is precisely the same as the law in New York (*Crouse* v. *McVickar*, 207 N. Y. 213) and the law as expressed in the Federal Court and already reviewed by this Court (*Ingram* v. *Lewis*, 37 Fed. 2nd 259, cert. denied 282 U. S. 842), is no different from the "substantive law" as expressed in New York State (*Crouse* v. *McVickar*, 207 N. Y. 213; *Ross* v. *Preston*, 292 N. Y. 433, 437; *Byrnes* v. *Owen*, 243 N. Y. 211; *Verplank* v. *Van Buren*, 76 N. Y. 247, and see all the other cases cited on this point on pp. 93 and 94 of the learned court's opinion below).

And the law on this point—that a state court judgment obtained by extrinsic fraud may be collaterally attacked in the Federal Court—has already been analyzed by this Court and found not wanting—and found to be the same whether applied to a "Creek Indian fallen among thieves" or to a trust fund beneficiary fallen amongst the security manipulators of Wall Street (*Ingram* v. *Lewis*, 37 Fed. 2nd 259, cert. denied 282 U. S. 842; *Crouse* v. *McVickar*, 207 N. Y. 213).

Respectfully submitted,

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